

Alison K. Hurley, State Bar No. 234042  
ahurley@bremerwhyte.com  
Tiffany L. Bacon, State Bar No. 292426  
tbacon@bremerwhyte.com  
BREMER WHYTE BROWN & O'MEARA LLP  
20320 S.W. Birch Street  
Second Floor  
Newport Beach, California 92660  
Telephone: (949) 221-1000  
Facsimile: (949) 221-1001  
Attorneys for Defendants,  
FRANK FERRARA and CHARLIE FERRARA

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

CORY SPENCER, an individual; DIANA  
MILENA REED, an individual; and  
COASTAL PROTECTION RANGERS,  
INC., a California non-profit public  
benefit corporation,

Plaintiff,

vs.

LUNADA BAY BOYS; THE  
INDIVIDUAL MEMBERS OF THE  
LUNADA BAY BOYS, including but not  
limited to SANG LEE, BRANT  
BLAKEMAN, ALAN JOHNSTON AKA  
JALIAN JOHNSTON, MICHAEL RAE  
PAPAYANS, ANGELO FERRARA,  
FRANK FERRARA, CHARLIE  
FERRARA; CITY OF PALOS VERDES  
ESTATES; CHIEF OF POLICE JEFF  
KEPLEY, in his representative capacity;  
and DOES 1-10,

Defendants.

Case No. 2:16-cv-2129

Judge: Hon. S. James Otero  
Dept: Courtroom 10C

Magistrate Judge:  
Hon. Rozella A. Oliver

**OPPOSITION TO PLAINTIFFS'  
MOTION FOR MONETARY  
SANCTIONS AGAINST CHARLIE  
FERRARA, FRANK FERRARA  
AND THIER COUNSEL OF  
RECORD BREMER WHYTE  
BROWN & O'MEARA**

Date: August 23, 2017  
Time: 10:00 a.m.  
Dept: Courtroom F

Complaint Filed: March 29, 2016  
Trial Date: November 7, 2017

Defendants, Frank Ferrara and Charlie Ferrara, and their counsel of record,  
Bremer Whyte Brown & O'Meara, LLP hereby submit their Memorandum of Points  
and Authorities in support of their Opposition to Plaintiffs, Cory Spencer, Diana  
Milena Reed and Coastal Protections Ranger, Inc.'s ("Plaintiffs"), Motion for

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1 Monetary Sanctions Against Charlie Ferrara, Frank Ferrara and Their Counsel of  
2 Record Bremer Whyte Brown & O'Meara ("Motion").

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **1. INTRODUCTION**

5 In their Motion for Monetary Sanctions against Charlie Ferrara, Frank Ferrara  
6 (collectively "the Ferraras") and their counsel, Bremer Whyte Brown & O'Meara,  
7 LLP ("BWBO"), Plaintiffs appear to make the outlandish claim they expended  
8 nearly seventy hours of attorney time drafting a few brief emails and attending three  
9 conference calls with Magistrate Judge Oliver in efforts to compel the Ferraras to  
10 produce cellular phone records requested in discovery. In fact, a review of Plaintiffs'  
11 billing records demonstrates that Plaintiffs spent only a fraction of the 66.1 hours  
12 actually pursuing any production from the Ferraras (21.7 hours), while more than  
13 2/3, a full 44.4 hours, of the sanctions requested relate solely to time allegedly spent  
14 preparing and drafting the instant motion – although that time is in and of itself  
15 grossly excessive. As set forth further herein, the amount of fees Plaintiffs claim  
16 they expended were neither reasonable nor necessary under the circumstances.

17 Notably, at no time prior to submitting their Motion for Sanctions did  
18 Plaintiffs' counsel attempt to meet and confer with BWBO to request reimbursement  
19 for attorney time spent pursuing discovery from the Ferraras. Given the discussions  
20 on the record during the most recent hearing, BWBO would have been willing and  
21 agreeable to discussing this issue with Plaintiffs had they met and conferred before  
22 spending more than a week's worth of attorney time drafting a sanctions motion.  
23 With regard to the work Plaintiff actually performed in pursuit of discovery from the  
24 Ferraras, BWBO has engaged in the very same meet and confer process since April  
25 of 2017 and expended only 5.5 hours for the very same work, a fraction of the time  
26 incurred by Plaintiffs.

27 From a substantive standpoint, Plaintiffs are forced to admit the voluminous  
28 record in this case is devoid of a single document suggesting the Ferraras' cell phone

1 records contain anything relevant to Plaintiffs' claims. Frank Ferrara has testified to  
2 texting with Defendant Sang Lee about a car between March and July of 2016, and  
3 Defendant Sang Lee testified he has had no communications with the Ferraras about  
4 Lunada Bay that would be supportive of Plaintiffs' claims. (Bacon Decl., Exs. A  
5 through C.) Moreover, Charlie Ferrara testified that any communications he had  
6 with Defendant Lee prior to March of 2016 would have involved discussions  
7 pertaining to available work. (Bacon Decl., Ex. C.) This testimony is literally the  
8 only evidence of any telephonic or electronic communication between the Ferraras  
9 and Defendant Sang Lee. Plaintiffs are thus forced to admit their suspicion that pre-  
10 February 2016 cell phone records *might* contain **relevant** information is pure  
11 speculation. Now that Plaintiffs have all of the cell phone records in the Ferraras'  
12 possession, custody and control, the absence of incriminating information has been  
13 confirmed.

14 Plaintiffs' entire Motion turns on their pursuit of four years' worth of the  
15 Ferraras' cell phone records, as well as Electronically Stored Information ("ESI")  
16 from the cell phones requested for the first time just last month. The Ferraras turned  
17 over what they were able to locate, and BWBO gathered and delivered the cell phone  
18 ESI within days of its extraction. As Plaintiffs have never subpoenaed the Ferraras  
19 cell phone service providers to obtain archived information the Ferraras are no longer  
20 able to access on their own, it is clear Plaintiffs' intent is not to uncover the truth  
21 regarding the timing and content of their communications, but rather to muddy the  
22 waters and create enough of an issue to keep the Ferraras in the case despite  
23 overwhelming evidence they were never involved in any of the alleged tortious  
24 activity.

25 To characterize four year old text messages as "critical (and likely  
26 incriminating) evidence" supporting Plaintiffs' claims without any evidence of the  
27 same is unbelievably reckless of Plaintiffs. The record demonstrates a total absence  
28 of any factual support for Plaintiffs' claims against the Ferraras. It has also now



1 been conclusively demonstrated that Plaintiffs have in their possession evidence  
2 exculpating Charlie Ferrara from any liability to Plaintiffs in this case – evidence  
3 capable of supporting an abuse of process claim against Plaintiffs and their counsel  
4 once judgment is entered in Charlie Ferrara’s favor at the conclusion of this case.

5 Simply put, Plaintiffs have not and cannot justify an award of more than  
6 \$30,000.00 in sanctions for 66 hours of work under the circumstances. For this, and  
7 all of the reasons above and as set forth herein, Plaintiffs’ Motion for Monetary  
8 Sanctions must be denied.

9 **2. STATEMENT OF FACTS**

10 **2.1 Defendants’ Counsels’ Meet-and-Confer Correspondences with**  
11 **Plaintiffs’ Counsel**

12 Counsel for the Ferraras, Alison Hurley, Esq. and Tiffany Bacon, Esq., filed  
13 Notices of Appearance in this matter on March 29, 2017. (Docket Nos. 236 and  
14 237.) On April 14, 2017, the Ferraras’ counsel received their first email from  
15 Plaintiffs’ counsel demanding a call with Magistrate Judge Oliver, without a prior  
16 letter or call to informally address Plaintiffs’ discovery issues. (Bacon Decl., ¶ 2.)  
17 After exchanging brief email communications on April 17, 2017, BWBO met and  
18 conferred with Plaintiffs’ counsel telephonically on April 21, 2017 for the first time  
19 regarding the discovery issues. (Bacon Decl., ¶ 3.) On April 26, 2017, BWBO sent  
20 an email to Plaintiffs’ counsel with a brief summary of the discussion during the  
21 telephonic meet and confer, and Plaintiffs’ counsel responded on May 1, 2017.  
22 (Bacon Decl., ¶ 4.)

23 In the midst of meeting and conferring on the Ferraras’ responses to Plaintiffs’  
24 document requests, Plaintiffs served six additional sets of discovery on the Ferraras,  
25 on June 2, 2017 and June 8, 2017. (Bacon Decl., ¶ 5.) Plaintiffs’ counsel sent a  
26 letter on June 27, 2017 demanding a telephonic hearing with Magistrate Judge  
27 Oliver. (Bacon Decl., ¶ 6.) Such demand was unreasonable and premature under the  
28 circumstances given the Ferraras never indicated their unwillingness to produce

1 responsive information to Plaintiffs' requests and had otherwise indicated efforts  
2 made to produce the responsive information. In fact, the communications exchanged  
3 between counsel evidence the fact that efforts were being made to obtain responsive  
4 documents. (Wolff Decl., Exs. 11, 14, 17, and 21.) On or about July 3, 2017,  
5 Plaintiffs' counsel and counsel for the Ferraras had another informal, telephonic meet  
6 and confer, wherein Plaintiffs' counsel, for the *first time*, requested the Ferraras  
7 conduct a full extraction of cellular phone data, which had not been specifically  
8 requested in any of Plaintiffs' discovery requests. (Bacon Decl., ¶ 7.) Plaintiffs were  
9 informed during this brief meet and confer that the Ferraras were making diligent  
10 efforts to obtain cellular phone records from their provider, and that they would  
11 make efforts to extract their cellular phone data in order to produce *responsive*  
12 *documents* to Plaintiffs' requests. (Bacon Decl., ¶ 8.) Knowing BWBO would not  
13 be available to further meet and confer regarding written discovery the day it was  
14 defending Frank Ferrara's deposition, Plaintiffs' counsel sent an email the same day,  
15 July 10, 2017, demanding a telephonic hearing with Magistrate Judge Oliver. For  
16 obvious reasons, BWBO was unable to respond to that email until after Frank  
17 Ferrara's deposition concluded, wherein BWBO expressed to Plaintiffs' counsel that  
18 the Ferraras never expressed any unwillingness to produce documents but instead  
19 have made efforts to obtain the requested records from their cell phone provider with  
20 no success. (Bacon Decl., ¶ 9.)

21 **2.2 The July 13, 2017 Telephonic Hearing and Counsels' Further Meet-**  
22 **and Confer Correspondences**

23 After the telephonic hearing with Magistrate Judge Oliver on July 13, 2017,  
24 the Ferraras were ordered "to produce responsive documents from the cell phone  
25 imaging and responsive cell phone bills and records" within four days, by July 17,  
26 2017, and only ten days after Plaintiffs' counsel made her first request that the  
27 Ferraras conduct a full scale extraction of ESI data from their cell phones. (Bacon  
28 Decl., ¶ 11; see Docket No. 267.) While the short timeframe rendered compliance

1 very difficult, the Ferraras made their best efforts at compliance. On July 17, 2017,  
2 in accordance with the Court's order, the Ferraras produced responsive documents  
3 from the cell phone imaging and responsive cell phone bills and records. (Bacon  
4 Decl., ¶¶ 12-13.)

5 Of import, however, is the fact the Ferraras could not complete the extraction  
6 of data from their cell phones until July 16, 2017, which resulted in approximately  
7 3,200 pages of documents, the majority of which had to be vetted for actual  
8 responsive information to Plaintiffs' document requests. (Bacon Decl., ¶ 12.) While  
9 Plaintiffs take the position the entire extraction report should have been turned over  
10 immediately, the ESI unquestionably included information totally irrelevant to this  
11 matter and not responsive to the subject requests – e.g. inspirational texts and bible  
12 verses sent by the Ferraras and personal, intimate conversations between the Ferraras  
13 and their close family members, including their spouses. (Bacon Decl., ¶ 12.) On  
14 July 17, 2017, the Ferraras *in good faith* produced 1,200 pages of vetted, responsive  
15 documents from cell phone imaging and responsive cell phone bills as part of a  
16 rolling production. 1,200 pages was the total amount of pages BWBO had been able  
17 to review as of the production date given that the ESI extraction was completed only  
18 the day before.<sup>1</sup> (Bacon Decl., ¶ 13.)

19 On July 18, 2017, Plaintiffs' counsel sent a short, one-page letter to BWBO  
20 indicating the production was improperly redacted.<sup>2</sup> (Bacon Decl., ¶ 14.) BWBO

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21  
22 <sup>1</sup> BWBO made all efforts possible to produce responsive documents to Plaintiffs as  
23 soon as possible. Rather than consume time in an effort to seek *ex parte* relief for an  
24 extension of time to produce *all* responsive documents, efforts were expended to  
provide as much responsive information as readily available on July 17, 2017 in  
accordance with the Court's July 13, 2017 Order.

25 <sup>2</sup> Plaintiffs complain of the redactions made to the cell phone imaging records  
26 produced, asserting that no privilege log was provided. The information contained  
27 personal, sometimes intimate, messages between family members (including  
28 spouses), completely irrelevant to this lawsuit and not responsive to Plaintiffs'  
subject discovery. If the Court is not inclined to agree with the Ferraras regarding  
the redactions, the Ferraras are amenable to producing the Court with both extraction  
reports for the Court's in camera review.



1 responded immediately and explained the redactions were made in order ensure  
2 production of *only responsive information* to Plaintiffs' requests, in compliance with  
3 the Order of this Court rather than a bad faith "document dump" of hundreds of  
4 irrelevant items. (Bacon Decl., ¶ 15.) Despite BWBO resolving this issue by  
5 informing Plaintiffs' counsel of the above, and that the remaining responsive  
6 documents would be produced as expeditiously as possible, Plaintiffs demanded an  
7 additional telephonic hearing with Magistrate Judge Oliver. This conference  
8 proceeded on July 26, 2017 pursuant to the Court's availability. (Bacon Decl., ¶ 15.)  
9 BWBO informed the Court at the July 26, 2017 hearing that all remaining responsive  
10 information would be produced to Plaintiffs' counsel as quickly as possible (that  
11 Charlie's Ferrara's extraction report would be produced the same day), and the Court  
12 made no further order regarding the Ferraras' production, only setting the briefing  
13 schedule on this Motion. (See Wolff Decl., Ex. 23.) By July 27, 2017, the Ferraras  
14 had produced all documents within their possession responsive to Plaintiffs'  
15 discovery requests in accord with the Court's Order of July 13, 2017. (Bacon Decl.,  
16 ¶ 17.)

17 While the Ferraras readily admit the conclusion of their document production  
18 occurred after the July 17, 2017 production date Ordered on July 13, 2017, it is  
19 indisputable that the production *was* completed soon thereafter, and Plaintiffs had the  
20 vast majority of the information requested from the Ferraras well in advance of the  
21 summary judgment opposition filing deadline. (Bacon Decl., ¶ 17.)

22 The Defendants' slight delay in completing their rolling production of ESI in  
23 no way justifies an Order requiring them to reimburse Plaintiffs for 44 hours spent  
24 drafting the instant sanctions motion, which is clearly a means to an end in and of  
25 itself, rather than a good faith effort to recover sums actually spent pursuing  
26 discovery from Defendants. Tellingly, at no time did Plaintiffs' counsel contact  
27 BWBO to discuss the potential for reimbursement of the attorneys' fees they  
28 incurred in pursuit of the Ferraras' responsive documents. (Bacon Decl., ¶ 18.)

1           **2.3    Defendant Sang Lee Testified His Text and Phone Communications**  
2           **With the Defendants Are Irrelevant to Plaintiffs' Claims**

3           No documents produced by the Ferraras in this action provide any information  
4           supportive of Plaintiffs' claims. Plaintiffs continue to rely on a speculative  
5           assumption that the purportedly "missing" communications between Defendant Sang  
6           Lee and the Ferraras, as shown in Defendant Lee's privilege log, are potentially  
7           relevant and supportive of Plaintiffs' claims. However, Defendant Sang Lee was  
8           deposed in this matter on May 31, 2017. Defendant Lee was directly asked at his  
9           deposition if he ever had any communications with the Ferraras regarding Lunada  
10          Bay:

11                   "Q: And you also testified that [Frank Ferrara] has never told you  
12                   to behave in any certain way when it comes to actions at  
13                   Lunada Bay?

14                   A: Absolutely not, yeah.

15                   Q: Have you ever had any communications with Frank Ferrara  
16                   about preventing persons from visiting Lunada Bay?

17                   A: Absolutely not.

18                   Q: What about preventing persons from surfing at Lunada Bay?

19                   A: Absolutely not.

20                   Q: Have you ever had any communications with Charlie Ferrara  
21                   about preventing any person from surfing at Lunada Bay?

22                   A: Absolutely not.

23                   Q: Have you ever had any communications with Charlie Ferrara  
24                   about preventing persons from visiting Lunada Bay?

25                   A: Absolutely not.

26                   Q: Have you ever witnesses Charlie Ferrara ever attempt to  
27                   prevent somebody from visiting Lunada Bay?

28                   A: Absolutely not.

                  Q: And what about surfing at Lunada Bay?

                  A: Absolutely not.

                  ...

                  Q: Have you ever witnesses Frank ever try to attempt to prevent  
                  anybody from surfing at Lunada Bay?

1 A: Absolutely not.

2 Q: What about visiting Lunada Bay?

3 A: Absolutely not.” (Bacon Decl., Ex. A, Lee Dep. at 294:20-  
4 295:25)

5 From the tenor of the papers submitted by Plaintiffs supporting this motion,  
6 one would get the impression they have at least some evidence that the Ferraras at  
7 one time had some communication with another Defendant potentially supportive of  
8 Plaintiffs’ claims. However, Plaintiffs must (and implicitly do) admit the record is  
9 completely devoid of any support for their contention that the Ferraras ever  
10 interacted with any Defendant in a manner supportive of Plaintiffs’ claims.

11 Defendant Sang Lee has not had any communications with the Ferraras that would be  
12 supportive of Plaintiffs’ claims. The Ferraras’ testimony confirms the same, and no  
13 other evidence of any relevant communications with any defendant exists. The  
14 alleged “missing” communications between Defendant Lee and the Ferraras are  
15 irrelevant and will not support Plaintiffs’ claims.

16 **2.4 Defendants, Frank Ferrara and Charlie Ferrara Testified their**  
17 **Communications With Defendant Sang Lee Are Irrelevant to**  
**Plaintiffs’ Claims**

18 Frank Ferrara and Charlie Ferrara were both asked during their depositions  
19 about their communications with the co-defendants. Frank Ferrara was specifically  
20 asked about his communications with Defendant Sang Lee:

21 “Q: Let’s talk about the first one which I’m going to represent to  
22 you from Sang’s phone records that there was a  
23 conversation with you and a lot of people, actually, on  
24 March 30th, right around that time frame. Do you  
25 remember what you talked about?

26 A: I think that we just talked a little bit about the case a little bit,  
27 but I don’t remember exactly what we said to each other.

28 Q: And have you ever spoken with Sang before that - -

A: Yes.

Q: - - by telephone?

1 A: Yeah. We've talked and texted. I tried to help his mom out  
2 and buy a car for them. Actually, from them, I was buying  
a car from them.

3 Q: And do you recall having another conversation with him in  
4 July, just on the phone?

5 A: I believe we did because he was asking me if I had been  
served or not. And I said that I wasn't served.

6 Q: Anything else that you guys?

7 A: No.

8 Q: Other than Sang Lee, what other Defendants have you  
discussed the lawsuit with?

9 A: None." (Bacon Decl., Ex. B, F. Ferrara Dep. at 275:20-  
10 276:21)

11 Charlie Ferrara also testified about his communications with Defendant Sang  
12 Lee, providing the following testimony:

13 "Q: Do you communicated with Sang Lee by cell phone?

14 A: No.

15 Q: Have you ever texted or called him?

16 A: Yes. I used to work with him like a few years ago. We would  
17 do some - - he's a roofer. And he has some work for me.  
So, I worked with him so.

18 Q: Do you recall approximately the dates that you worked with  
19 him?

20 A: The years probably, let me think, um, probably 2013 - - well,  
no, no, it's before that. So about 2008. And then 2014 a  
21 couple little side jobs. That's pretty much it.

22 Q: It's just working with him kind of sporadically?

23 A: Exactly." (Bacon Decl., Ex. C, C. Ferrara Dep. at 47:25-  
48:15)

24 It is apparent from the Ferraras' testimony, and collectively with the testimony  
25 of Defendant Sang Lee, that the purported "missing" communications between  
26 Defendant Sang Lee and the Ferraras that Plaintiffs claim are critical to their case are  
27 actually irrelevant to their claims.

28 ///



1           **2.5    Plaintiffs Misrepresent Charlie Ferrara's Testimony Regarding the**  
2           **Search He Conducted**

3           While Plaintiffs lead the Court to believe that Charlie Ferrara made no efforts  
4 to obtain his cell phone records, his testimony demonstrates this is incorrect.  
5 Plaintiffs' counsel, Samantha Wolff, Esq., deposed Charlie Ferrara on July 7, 2017,  
6 and Charlie Ferrara testified with the following:

7                   Q: Can you tell me what efforts you've made to locate prior cell  
8                   phone bills from January of 2013 to the present time?

9                   A: Um, yeah.

10                  Q: Have you personally reached out to - -

11                  A: Yes. I try tried to reach out to AT&T and Sprint just one  
12                   time, but I didn't proceed. I think they were just send you  
13                   like a booklet and you have to go through . . . My mom  
14                   tried, yeah. I think she tried too, to get something from  
15                   AT&T because it's on her account. And the Sprint thing I  
16                   got nowhere with Sprint.

17                  Q: And you said that you think that they sent you a booklet; did  
18                   you receive anything?

19                  A: Yeah, I'm sorry, I didn't receive anything. I just know from  
20                   the Sprint because that was my account. It was just kind of  
21                   getting, they talk to this person, talk to that person, giving  
22                   me the run around. And AT&T my mom said it was under  
23                   her name for her account. So, she just said that she  
24                   couldn't get something. And I did hear somewhere that  
25                   maybe sending her a booklet or book with every phone call  
26                   or text, so, but she never got it." (Bacon Decl., Ex. C, C.  
27                   Ferrara Dep. at 164:13-166:4.)

28           It is apparent from Charlie Ferrara's testimony that he made efforts, as did his  
mother, to obtain the requested cell phone bills and records. Despite his efforts, he  
was unable to secure copies of the requested information from his cell phone  
providers, and as a result the documents requested were never in Charlie Ferrara's  
possession, custody or control to produce.<sup>3</sup> The records of cell phone bills prior to

<sup>3</sup> It is important to note that Charlie Ferrara also testified that he is not literate with  
computers. Moreover, he testified at his deposition that he suffered a serious brain  
injury in 2012, which required him to undergo six months of cognitive therapy.  
(Bacon Decl., Ex. C, C. Ferrara Dep. at 26:3-17; 46:15-47: 3.)

1 February 21, 2016 are maintained by a third party, the Ferraras' cell phone provider.  
2 While the Ferraras have requested their cell phone billing records on numerous  
3 occasions, the provider has failed to produce the records to the Ferraras for  
4 distribution to Plaintiffs. Even so, there is no destruction of the third party records  
5 because the cell phone service provider is the custodian of its records.

6 Plaintiffs' counsel made no such inquiry regarding Frank Ferrara's search for  
7 records at his deposition, which is made evident by the fact Plaintiffs have cited to no  
8 evidence in support of the same.

9 **3. ARGUMENT**

10 **3.1 This Court Has the Authority to Deny Plaintiffs' Motion**

11 *Federal Rule of Civil Procedure 37* provides that the Court's power to award  
12 monetary sanctions is discretionary. "As a general rule, the imposition of sanctions  
13 for abuse of discovery under Fed. R. Civ. P. 37 is a matter within the discretion of  
14 the trial court. A district judge abuses its discretion when it renders an arbitrary,  
15 capricious, whimsical, or manifestly unreasonable judgment." (Coletti v. Cudd  
16 Pressure Control, 165 F.3d 767, 777 (10th Cir. 1999) (internal citations and  
17 quotations omitted).) Plaintiffs acknowledge the Court's discretion to award  
18 sanctions in their Motion. Furthermore, "the decision to impose sanctions . . . is  
19 uniquely within the province of a district court, . . . any such decision [must be] made  
20 with restraint and discretion." (Salovaara v. Eckert, 222 F.3d 19, 27 (2d Cir. 2000).)

21 Additionally, monetary sanctions should not be issued when a party's "failure  
22 was substantially justified or other circumstances make an award of expenses  
23 unjust." (Fed. R. Civ. P. 37(b)(2)(C).) As is set forth herein, making an award of  
24 sanctions in the amount requested by Plaintiffs would be entirely unjust under the  
25 circumstances. Plaintiffs received a full and complete production of all responsive  
26 documents within the possession of the Ferraras by July 27, 2017. Additionally, as  
27 further set forth herein in section 3.2, Plaintiffs' counsel's billing entries submitted in  
28 support of the instant Motion demonstrate the inflation of time spent and the

1 existence of duplicative tasks, without any effort of counsel to meet and confer on  
2 the subject of reimbursement in advance of spending substantial time (44.4 hours) on  
3 the Motion itself. It is obvious the ends do not justify the means, and Plaintiffs  
4 should not be awarded sanctions for the excessive time spent drafting the instant  
5 Motion.

6 **3.2 Plaintiffs' Request for Monetary Sanctions in the Form of**  
7 **Attorneys' Fees is Not Reasonable**

8 *Federal Rule of Civil Procedure 37(b)(2)* authorizes the Court only to impose  
9 reasonable expenses, at its discretion. Plaintiffs' counsel's billing records, attached  
10 to the Wolff Declaration as Exhibit 24, clearly indicate they spent only 21.7 hours in  
11 pursuit of the actual production of documents from the Ferraras. Plaintiffs' confirm  
12 in their Motion an entitlement to recover only *reasonable* attorneys' fees, but the  
13 \$32,000.00 requested is anything but reasonable.

14 The majority of the work memorialized in Exhibit 24 is dedicated to the  
15 preparation and filing of the instant Motion, a shocking total of 44.4 hours, twice as  
16 much as the efforts made by Plaintiffs' counsel meeting and conferring on the  
17 Ferraras' production as reflected in counsel's billing entries. Plaintiffs' counsel  
18 admits they spent more billable time on their Motion to obtain reimbursement for  
19 their attorneys' fees than they actually spent pursuing the discovery.

20 BWBO by contrast, participating in the same meet and confer conferences and  
21 hearings with the Magistrate, incurred approximately 5.5 hours conferring with  
22 Plaintiffs' counsel and appearing for telephonic hearings with the Court in Plaintiffs'  
23 pursuit of the Ferraras' responsive documents, about a quarter of the time Plaintiffs'  
24 counsel's purports to have spent for the very same activity. (Bacon Decl., ¶ 19.)  
25 Further detailed review of Plaintiffs' billing entries, as further detailed herein, reveals  
26 certain of the entries are duplicative, inflated and/or encompassing communications  
27 potentially irrelevant to the meet and confer on the Ferraras' production.  
28

1 For example, on April 14, 2017, Plaintiffs' counsel sent an email to BWBO,  
2 which consisted of two short paragraphs, but Plaintiffs' counsel billed .8 hours for  
3 this task. (Wolff Decl., Ex. 24, pg. 1; Bacon Decl., ¶ 2.) On April 21, 2017,  
4 Plaintiffs' counsel billed 1.9 hours for a telephonic meet and confer with BWBO.  
5 (Wolff Decl., Ex. 24, pg. 1.) This call was slightly over one half hour, and BWBO  
6 billed .6 hours for this same telephonic communication. (Bacon Decl., ¶ 3.) On June  
7 27, 2017, Plaintiffs' counsel sent a one-page letter to BWBO demanding the  
8 Ferraras' production and requesting availability for a telephonic meet and confer.  
9 (Wolff Decl., Ex. 15.) Plaintiffs' counsel billed 2.5 hours for drafting a two  
10 paragraph summary of its position on the Ferrara's production and brief request for a  
11 telephonic meet and confer. Such required no research or other significant  
12 preparation, as no authorities whatsoever are cited therein. On July 3, 2017,  
13 Plaintiffs' counsel billed 1.0 hour for a telephonic meet and confer with BWBO that  
14 lasted fewer than 15 minutes. (Wolff Decl., Ex. 24, p. 1; Bacon Decl., ¶ 7.)

15 Plaintiffs' records contain a July 10, 2017 entry for 1.9 hours indicating  
16 counsel "review[ed] discovery responses from Charlie and Frank Ferrara to identify  
17 deficiencies in production responses." (Wolff Decl., Ex. 24, p. 2.) It is puzzling why  
18 counsel would continue to review the same responses they had already been  
19 discussing with BWBO for nearly seven months. On July 12, 2017, BWBO billed  
20 only .3 hours for meeting and conferring with Plaintiffs' counsel; however,  
21 Plaintiffs' counsel's billing entry states a billing amount of 2.7 hours for the same  
22 communication in addition to preparing for the hearing regarding discovery. (Bacon  
23 Decl., ¶ 10; Wolff Decl., Ex. 24, p. 2.) Notably, however, Plaintiffs' counsel again  
24 billed 3.4 hours on July 13, 2017 for preparing for and attending the hearing  
25 regarding the Ferraras' discovery when the telephonic hearing was a little over one  
26 hour. (Wolff Decl., Ex. 24, pg. 2; Bacon Decl., ¶ 11.) On July 18, 2017, Plaintiffs'  
27 counsel billed 1.5 hours for the preparation of a one-page letter regarding the  
28 Ferraras' production of responsive information.



1 Lastly, on July 25, 2017 and July 26, 2017, Plaintiffs' billing reflects a  
2 duplicative entry of 1.1 hours in preparing for and attending the hearing with  
3 Magistrate Judge Oliver regarding the Ferraras' discovery responses. (Wolff Decl.,  
4 Ex. 24, p.2.) These examples of overbilling demonstrate the unreasonableness of  
5 attorneys' fees claimed in the instant Motion.

6 The remaining billing entries - from August 2, 2017 and onward - involve  
7 preparation of Plaintiffs' Motion for Sanctions. The 44.4 hours Plaintiffs' claim to  
8 have billed preparing this motion is grossly excessive, more than double the amount  
9 of time Plaintiffs' counsel billed for its meet and confer efforts regarding the  
10 Ferraras' discovery responses and production. Surprisingly, despite all of the alleged  
11 billable time, Plaintiffs' counsel only cites to eight cases and two rules (Fed. R. Civ.  
12 P. 37 and Local Rule 83-7) in support of their Motion,<sup>4</sup> when Plaintiffs' counsel's  
13 billing entries appear to reflect that Plaintiffs' counsel spent over 13 hours  
14 researching in preparation of this Motion. Based on the foregoing examples of  
15 Plaintiffs' overstated time entries, Plaintiffs' claimed fees and sanctions request for  
16 the pursuit of the Ferraras' production is exceptionally unreasonable. Plaintiffs  
17 should not be awarded any attorneys' fees in accordance with their inflated billing  
18 records.

19 Plaintiffs' Motion should be denied or, at the very least, the Court should  
20 significantly reduce the attorneys' fees sought by Plaintiffs to coincide with the time  
21 spent by BWBO on the Ferraras' discovery matters. To award Plaintiffs otherwise  
22 would be entirely unjust under the circumstances.

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25 ///

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27 <sup>4</sup> Further, there are citation errors within Plaintiffs' Motion.  
28

1           **3.3 Plaintiffs' Cannot Demonstrate the Relevance and Prejudice**  
2           **Associated with the Claimed "Destroyed" Evidence**

3           Plaintiffs' motion requests the imposition of a spoliation sanction against the  
4           Ferraras despite absolutely no evidence that either Frank Ferrara or Charlie Ferrara  
5           destroyed any information relevant to this action. In support thereof, Plaintiffs cite to  
6           a case out of the Southern District of New York, which applied the following three-  
7           part test regarding requested sanctions for spoliation of evidence: "(1) that the party  
8           having control over the evidence had an obligation to preserve it at the time it was  
9           destroyed; (2) that the *records were destroyed with a 'culpable state of mind'* and  
10          (3) that the destroyed evidence was 'relevant' to the party's claim or defense *such*  
11          *that a reasonable trier of fact could find that it would support that claim or*  
12          *defense.*" (Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003)  
13          (emphasis added).) Setting aside the Ferraras' purported duty to preserve relevant  
14          information, Plaintiffs cannot demonstrate any culpable mindset by either Ferrara nor  
15          "that the destroyed evidence was relevant to the [Plaintiffs' claims] such that a  
16          reasonable trier of fact could find that it would support [those] claims." (Id.)

17          Plaintiffs are required to "demonstrate not only that [the Ferraras] destroyed  
18          relevant evidence as that term is ordinarily understood, but also that the destroyed  
19          evidence would have been favorable to [Plaintiffs]. This corroboration requirement  
20          is even more necessary where the destruction was merely negligent, since in those  
21          cases it cannot be inferred from the conduct of the spoliator that the evidence would  
22          even have been harmful to him." (Zubulake, 220 F.R.D. at 221.) Plaintiffs' Motion  
23          complains of missing records for a total of three days, January 29, 2016, February 5,  
24          2016 and February 13, 2016. However, the communications between Defendant  
25          Sang Lee and the Ferraras as provided Defendant Lee's privilege log, which  
26          precipitated this entire dispute, do not take place on the foregoing three days, or any  
27          time frame near these days.. Defendant Lee's privilege log (Ex. 6 to the Wolff Deci.)  
28          and Defendant Lee's entire, unredacted extraction report are on file with the Court as

1 evidence of the foregoing. This begs the question as to what purported “relevant  
2 evidence” Plaintiffs are seeking. Plaintiffs have not submitted any evidence to this  
3 Court of any other communications between the Ferraras and any other defendant,  
4 during the relevant time periods, that would be supportive of Plaintiffs’ claims.  
5 Absent this evidence within the thousands of pages of documents produced in this  
6 action to date, no such communications between the Ferraras and any other  
7 defendant exist. Based thereon, a reasonable trier of fact would not find that the  
8 purported “missing” communications would support Plaintiffs’ claims.

9       Moreover, while Plaintiffs suggest in their motion that the cell phone bills  
10 covering the listed dates have been destroyed, no evidence of the same exists. The  
11 Ferraras have testified to their failed efforts to recover the subject bills and the fact  
12 that the bills for the time period in question are not available based on requests by the  
13 Ferraras alone. (Bacon Decl., Ex. C, C. Ferrara Dep. at 164:13-166:4) However,  
14 this fact does not reasonably lead to the conclusion that the records have therefore  
15 been destroyed. It is by the mere passage of time that the Ferraras are unable to  
16 access the records through their online portal, but the records are still available  
17 through their providers by other means.<sup>5</sup> The only reasonable conclusion available –  
18 given that the Ferraras do not control their cell service providers’ document retention  
19 policies – is that the subject records have not been subpoenaed from the third party  
20 providers who hold custody of them. Despite the purported “critical” nature of these  
21 records, Plaintiffs have not yet attempted to subpoena them from the Ferraras’  
22 provider. In an effort to assuage Plaintiffs’ accusations of bad faith and intentional  
23 destruction, the Ferraras offer to issue subpoenas to their own cellular service  
24 providers for the records as Plaintiffs have inexplicably chosen not to do so.

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26  
27 <sup>5</sup> Upon the understanding that the Ferraras did not know how to access their cell  
28 phone billing records online, BWBO obtained permissible access to their online  
account resulting in the production of the available cell phone records.

1 If the Court is inclined to conclude that some intentional spoliation occurred at  
2 the hands of the Ferraras, Plaintiffs certainly cannot demonstrate any prejudice they  
3 suffered, because the evidence is clear through the testimony of defendants that the  
4 sought after communications do not pertain to Lunada Bay. (Apple, Inc. v. Samsung  
5 Elecs. Co., 888 F. Supp. 2d 976, 998 (N.D. Cal. 2012.) The Court should choose  
6 “the least onerous sanction corresponding to the willfulness of the destructive act and  
7 the prejudice suffered by the victim.” (Id. at 992.) The lack of relevant information  
8 coupled with the lack of prejudice should equate to no award of sanctions.

9 **4. CONCLUSION**

10 For the reasons set forth herein, Frank Ferrara, Charlie Ferrara and Bremer  
11 Whyte Brown & O’Meara respectfully request this Court deny Plaintiffs’ Motion for  
12 Monetary Sanctions.

13 Dated: August 21, 2017

BREMER WHYTE BROWN & O’MEARA  
LLP

14  
15 By: 

16 Alison K. Hurley  
17 Tiffany L. Bacon  
18 Attorneys for Defendants  
19 FRANK FERRARA and CHARLIE  
20 FERRARA  
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**PROOF OF SERVICE**

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 20320 S.W. Birch Street, Second Floor, Newport Beach, California 92660.

On August 21, 2017, I served the within document(s) described as:

OPPOSITION TO PLAINTIFFS' MOTION FOR MONETARY SANCTIONS AGAINST CHARLIE FERRARA, FRANK FERRARA AND THIER COUNSEL OF RECORD BREMER WHYTE BROWN & O'MEARA

on the interested parties in this action as stated on the attached mailing list.

☒ (BY ELECTRONIC SERVICE) Complying with Code of Civil Procedure § 1010, I caused such document(s) to be Electronically Filed and Served through the \_ for the above-entitled case. Upon completion of transmission of said document(s), a filing receipt is issued to the filing party acknowledging receipt, filing and service by 's system. A copy of the filing receipt page will be maintained with the original document(s) in our office.

Executed on August 21, 2017, at Newport Beach, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Hailey Williams  
(Type or print name)

  
(Signature)

**Cory Spencer v. Lunada Bay Boys et al.,**

**Case No. 2:16-cv-2129-SJO**

**BWB&O CLIENT: Frank and Charlie Ferrara**  
**BWB&O FILE NO.: 1178.176**

**SERVICE LIST**

<p>Samantha Wolff, Esq.  <b>HANSON BRIDGETT</b>  425 Market Street  26th Floor  San Francisco, CA 94105  (415) 777-3200  (415) 541-9366 Fax  Attorneys For <b>PLAINTIFF</b></p> <p><a href="mailto:swolff@hansonbridgett.com">swolff@hansonbridgett.com</a>  <a href="mailto:kfranklin@hansonbridgett.com">kfranklin@hansonbridgett.com</a></p>	<p>Tyson M. Shower, Esq.  <b>HANSON BRIDGETT</b>  500 Capitol Mall  Suite 1500  Sacramento, CA 95814  (916) 442-3333  (916) 442-2348 Fax  Attorneys For <b>PLAINTIFFS</b></p> <p><a href="mailto:tshower@hansonbridgett.com">tshower@hansonbridgett.com</a></p>	<p>Victor Otten, Esq.  <b>OTTEN LAW, PC</b>  3620 Pacific Coast Highway  Suite 100  Torrance, CA 90505  (310) 378-8533  (310) 347-4225 Fax  Attorneys For <b>PLAINTIFFS</b></p> <p><a href="mailto:vic@ottenlawpc.com">vic@ottenlawpc.com</a></p>
<p>Jacob Song, Esq.  <b>KUTAK ROCK LLP</b>  5 Park Plaza  Suite 1500  Irvine, CA 92614  (949) 417-0999  (949) 417-5639  Attorney For <b>CITY OF PALOS VERDES ESTATES and JEFF KEPLEY, in his representative capacity, serves as the Chief of Police Department of Defendant City of Palos Verdes Estates.</b></p> <p><a href="mailto:jacob.song@kutakrock.com">jacob.song@kutakrock.com</a></p>	<p>J. Patrick Carey, Esq.  <b>LAW OFFICE OF PATRICK CAREY</b>  1230 Rosecrans Avenue  Suite 270  Manhattan Beach, CA 90266  (310) 526-2237  (310) 356-3671 Fax  Attorney For <b>ALAN JOHNSTON individual member of LUNADA BAY BOYS aka JALIAN JOHNSTON</b></p> <p><a href="mailto:pat@patcareylaw.com">pat@patcareylaw.com</a></p>	<p>Aaron G. Miller, Esq.  <b>THE PHILIPS FIRM</b>  800 Wilshire Boulevard  Suite 1550  Los Angeles, CA 90017  (213) 244-9913  (213) 244-9915 Fax  Attorneys For <b>ANGELO FERRARA</b></p> <p><a href="mailto:amiller@thephillipsfirm.com">amiller@thephillipsfirm.com</a></p>
<p>Mark Fields, Esq.  <b>LAW OFFICES OF MARK C. FIELDS</b>  333 So. Hope Street  Suite 3500  Los Angeles, CA 90071  (213) 617-5225  (213) 629-2420 Fax  Attorney For <b>ANGELO FERRARA an individual member of LUNADA BAY BOYS and N.F. an individual member of LUNADA BAY BOYS</b></p> <p><a href="mailto:fields@markfieldslaw.com">fields@markfieldslaw.com</a></p>	<p>Peter R. Haven, Esq.  <b>HAVEN LAW</b>  1230 Rosecrans Avenue  Suite 300  Manhattan Beach, CA 90266  (310) 272-5353  (213) 477-2137 Fax  Attorneys For <b>MICHAEL RAY PAPAYANS</b></p> <p><a href="mailto:peter@havenlaw.com">peter@havenlaw.com</a></p>	<p>Dana Alden Fox, Esq.  <b>LEWIS BRISBOIS BISGAARD &amp; SMITH, LLP</b>  633 W. 5<sup>th</sup> Street  Suite 4000  Los Angeles, CA 90071  (213) 580-3858  (213) 250-7900 Fax  Attorneys For <b>SANG LEE</b></p> <p><a href="mailto:Dana.Fox@lewisbrisbois.com">Dana.Fox@lewisbrisbois.com</a></p>